requires that the judgment of one state shall serve as conclusive proof of the adjudication of the merits of the case in another state. Thereby the equities between the parties appearing in the original suit are determined, but not the rights of third parties *in absentia*. Whether the transferees are bound must be determined, not by the full faith and credit clause, nor by the *lex fori* of the divorce decree, but by the *lex situs* of the land affected. The determining reason for Justice Holmes' concurring in *Fall v. Eastin*,[17] was the express recognition of the controlling effect of the Nebraska law, the *lex situs*, as to the effect to be given to the Washington decree as against third parties who were not before the Washington court. English cases furnish strong authority for the principle that the duties and liabilities of transferees having notice of equitable claims are to be determined according to the *lex situs*.[18] Since by the law of Wisconsin—quite independently of the full faith and credit clause—the transferees taking with notice come under the equitable duties and liabilities which attach to the transferor, it was within the power of the Wisconsin court to adjudicate the rights of such transferees in giving relief to the plaintiff.[19]

B. L.

RIGHTS OF AN UNBORN INFANT IN A TORT ACTION FOR PRENATAL INJURIES.

The rights of a child *en ventre sa mere* are in many ways jealously protected by the law. It has frequently been stated that such a child if later delivered alive is, for all purposes beneficial to it, a person in being, its life commencing, in so far as its civil rghts are concerned, with the date of its conception.[1] A

[17] (1909) 215 U. S. 1, 15.

[18] Westlake, *Conflict of Laws* (5th ed.) pp. 233, 234; *Martin v. Martin* (1831) 2 Russ. & My. 507 (contract on marriage); *Hicks v. Powell* (1869) L. R. 4 Ch. 741 (an unregistered conveyance held not to be enforceable against third parties because not enforceable against them by the *lex situs*).

[19] See The Powers of Courts of Equity, by Professor Walter W. Cook (1915) 15 COL. L. REV. 37, 106, 228.

[1] *Hall v. Hancock* (1834) 15 Pick (Mass.) 255; *Harper v. Archer* (1842) 4 Sm. & M. (Miss.) 99. But if it is delivered dead, or so prematurely as to be incapable of living, it is treated as though it had never been born. *Marsellis v. Thalhimmer* (1830) 2 Paige Ch. (N. Y.) 35; *Martin's Estate* (1887) 3 Pa. Co. Ct. 212.

posthumous child will take under a will although it is not expressly mentioned, and it is included under the term child,[2] or even "children living at the time of the testator's decease."[3] It is entitled to take under the laws of descent,[4] and cannot be divested of inheritance or property without being made a party to the suit.[5] It may take a contingent remainder, and equity has permitted it, as *cestui que trust,* to hold a trustee liable, although it was not conceived at the time the trust was created.[6] The rule is designed for the benefit of the child and will not operate to its prejudice.[7] No distinction is made here on the ground that the infant could or could not be born viable, the sole test being conception, and an infant born eight months and twenty-one days after the death of his sister was declared to be *in esse* at the time of her death.[8]

The principle that a child *en ventre sa mere* is alive for all purposes beneficial to it includes the statutory right to sue for loss of support when the relative has been killed by the act or neglect of the defendant. The only English case, concerning a child *en ventre sa mere,* under Lord Campbell's Act,[9] which gives an action for the benefit of "the wife, husband, parent, and child," was in admiralty,[10] but the effort to confine the effect of this decision to admiralty has no justification. Children *en ventre sa mere* are "surviving children" within the meaning of the Texas statute and may recover for death of the parent due to the gross carelessness of another.[11] A recovery by the mother is no bar to an action by a child born after this recovery according to the better opinion,[12] although a California decision,[13] by a divided court.

[2] *Biggs v. McCarty* (1882) 86 Ind. 352.

[3] In *Doe v. Clarke* (1799) 2 H. Bl. 400, Eyre, C. J., said: "Independent of intention, I hold that an infant *en ventre sa mere,* who by the course and order of nature is then living, comes clearly within the description of children living at the time of his decease."

[4] *Smith v. McConnell* (1860) 23 Ill. 611; *Deal v. Sexton* (1907) 144 N. C. 157.

[5] *Massie v. Hiatt* (1884) 82 Ky. 314; see also *Deal v. Sexton, supra.*

[6] *Mansell v. Mansell* (1732) 2 P. Wms. 676.

[7] Swinborne, *Wills,* Vol. II. p. 562.

[8] *Hall v. Archer, supra.*

[9] (1846) 9 & 10 Vict. c. 93.

[10] *The George and Richard* (1871) 24 L. T. 717.

[11] *Nelson v. Galveston, Harrisburg & San Antonio R. Co.* (1890) 78 Tex. 621; *Texas & Pacific R. Co. v. Robertson* (1891) 82 Tex. 657.

[12] *Nelson v. Galveston, Harrisburg & San Antonio R. Co., supra; Roach v. Wolff* (1914) 96 Neb. 50.

[13] *Daubert v. Western Meat Co.* (1893) 139 Cal. 480.

declared that it was a bar, provided the defendant was ignorant of the pregnancy of the woman when the first judgment was secured, and that the child's only remedy is against its mother. A most strict construction has been given to statutes which hold the seller of intoxicating liquors liable for injury to person, property, or loss of support. It was a simple matter to permit a recovery by an infant born the day after the father's death,[14] and it was only a step to extend recovery to a child born two months later,[15] for in both of these cases the child had been conceived and furthermore was capable of being born viable. But this rule was extended under the following circumstances: A man purchased a glass of whiskey and while the bartender's attention was taken elsewhere, drained the bottle. In an intoxicated condition he assaulted his wife, then pregnant, and a kick in the side caused a miscarriage. From then on swellings recurred in her side every three or four weeks, causing her considerable trouble, but she was able to give birth to a healthy child more than two years later. This, however, left the woman in such a weakened condition that she died in a few months. Under a statute which stated: "The person so licensed shall pay all damages that individuals . . . . . may sustain," this child was permitted to recover for loss of support.[16]

However careful the law may be of the property rights of a child *en ventre sa mere*, its personal rights have never been recognized in a civil case. No court has permitted a child to maintain suit for injuries received before birth.[17] The child is not regarded as an entity, but as part of the mother, and all injuries not too remote are supposedly recoverable by her. The doctrine of the civil law that a child is to be considered *in esse* for all beneficial purposes is called a pure legal fiction which the courts will not extend.

In spite of the unanimity of these decisions there is considerable force in the objection to the rule. The medical authorities agree that a child which has reached such a stage that it could live apart from its mother is alive, and that even the embryo has

[14] *Quinlen v. Welch* (1893) 69 Hun (N. Y.) 584.

[15] *State ex rel. Niece v. Soale* (1905) 36 Ind. App. 73.

[16] *Phair v. Dumond* (1916) 99 Neb. 310.

[17] The cases on this subject are: *Dietrich v. Northampton* (1884) 138 Mass. 14; *Walker v. Great Northern Ry. Co.* (1890) 28 L. R. (Ir.) 69; *Allaire v. St. Luke's Hospital* (1900) 184 Ill. 359; *Gorman v. Budlong* (1901) 23 R. I. 169; *Buel v. United Railways Co.* (1913) 248 Mo. 126; *Nugent v. Brooklyn Heights R. Co.* (1913) 139 N. Y. S. 367; *Lipps v. Milwaukee Electric Ry. & Light Co.* (1916) 159 N. W. (Wis.) 916.

life. It is not true that the recovery permitted by law to the mother covers the injury to the child. The mother secures damages for her own injury, pain, and suffering involved, but in many cases these are entirely distinct from the injuries to the child. On principle why should not an infant be allowed recovery for injuries received *en ventre sa mere*? While at common law it was not homicide to kill a child in the mother's womb, yet, if the child is born alive, and dies from injuries inflicted before birth, the killing constitutes murder,[18] and a death due to the negligent treatment of doctor or nurse is manslaughter.[19] It is objected that injuries before birth are so remote and so speculative, that no reasonable estimate of the injury could be made. When the left side of a woman was crushed by the elevator in a hospital, where she had gone to await childbirth, and the child was born four days later with its left side withered and atrophied,[20] there was no insurmountable difficulty in tracing the connection. On the other hand there are cases where the embryo is so little developed that it would be practically impossible to tell. To meet this objection we suggest that the time at which a child could be born viable be taken as the dividing line. It is true that the exact time at which it could be born viable is not so clearly defined and settled a stage as conception, but a court would be able substantially to determine it. The case of *Lipps v. Milwaukee Electric Ry. & Light Co.*,[21] in denying a cause of action to a child that could not be born viable, and in refusing to commit itself on the alternative proposition, is certainly not in conflict with this opinion.

In a comparatively recent case,[22] in which a child was injured thirty-six days before birth by the negligence of the railroad, the court recognized the entity of the infant, but denied relief on the ground that there was no contractual relation between the unborn child and the railroad. The railroad would be compelled to carry a babe in the arms of its mother without charge and would be liable to it for injury by negligence. The defendant is chargeable with the common knowledge of mankind that a

---

[18] *Clark v. State* (1897) 117 Ala. 1.

[19] *Rex v. Senior*, 1 Moody C. Cas. 346.

[20] *Allaire v. St. Luke's Hospital, supra.*

[21] (1916) 159 N. W. (Wis.) 916.

[22] *Nugent v. Brooklyn Heights Co., supra;* see also *Walker v. Great Northern Ry. Co., supra.*

woman may be pregnant,[23] and it seems but a logical sequence to make him liable for acts or neglect which might reasonably be expected to injure a child *en ventre sa mere*.

In view of the recognition in other branches of the law of the rights of the unborn child, it is surely logical as well as practical to hold that an infant, injured when it could have been born viable, may, after birth, have an action for injuries to itself as well as to its property.

J. E. H.

JURISDICTION IN DIVORCE—FULL FAITH AND CREDIT AS REGARDS A PRIOR SUIT.

A man who with his wife had been domiciled in Massachusetts left her, moved to Georgia, and there having obtained a domicil secured a divorce. The wife had no actual notice of the suit instituted by the husband, though there was publication of notice as required by the Georgia law. Later the wife brought suit for divorce in Massachusetts and a decree was given in her favor.[1] The court held that the husband had unjustifiably deserted his wife, that the matrimonial domicil remained in Massachusetts, and that the Georgia decree would not be recognized.

The court refused to recognize the Georgia decision since it was not compelled to, for the case of *Haddock v. Haddock*[2] had decided that a decree of divorce not given in the actual domicil of the parties was not protected by the full faith and credit clause of the Federal Constitution unless both parties were before the court and the court had jurisdiction of the subject-matter. The Massachusetts court also refused even on the ground of comity to respect the Georgia decree.

Having rejected the decision of the Georgia court, the Massachusetts tribunal, citing the case of *Atherton v. Atherton*[3] as an authority, held that it had power to grant a divorce in a suit by the wife in the matrimonial domicil. In fact neither one of the cases cited by the court is conclusive authority upon this point, for in both of them[4] it was the husband who sued in the matri-

[23] *West v. Railroad* (1904) 187 Md. 363.

[1] *Perkins v. Perkins* (1916) 113 N. E. (Mass.) 841.

[2] (1905) 201 U. S. 526. Brown, Brewer, Harlan, and Holmes, JJ., *dissenting*.

[3] (1900) 181 U. S. 155. Fuller and Peckham, JJ., *dissenting*.

[4] *Atherton v. Atherton, supra; Thompson v. Thompson* (1912) 226 U. S. 551.